REASONS FOR GRANTING THE WRIT

The Court should grant *certiorari* for at least three reasons. *First*, the decision below contravenes this Court's prior decisions and cannot be squared with fundamental principles lying at the heart of federal preemption jurisprudence. (*See* Section A, below.) *Second*, the question presented addresses an important, recurring issue of federal law over which there is substantial confusion among the courts of appeals—namely, what role (if any) is there for a "presumption against preemption" when Congress expressly preempts state law in an area that has *not* been traditionally regulated by the States. (*See* Section B, below.) *Third*, this case raises a question of exceptional importance. If not reversed, the decision below threatens to undermine Congress's ability to deal effectively with new and emerging regulatory challenges of national importance, and protect federal statutory regimes from encroachment by the States. (*See* Section C, below.)

A. The Decision Below Conflicts With This Court's Prior Decisions.

The Court should grant the petition because the Ninth Circuit's ruling directly conflicts with this Court's prior decisions.

Time and again this Court has emphasized that where, as here, Congress expressly indicates its intent to displace state law with uniform federal regulation, courts asked to determine the preemptive scope of federal legislation "must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) ("*EMA*") (internal quotation omitted). This Court has accordingly held that if a statute "contains an express preemption clause, [the] 'task of statutory construction must *in the first instance* focus on the plain wording of the clause,

which necessarily contains the best evidence of Congress's preemptive intent.'" *Sprietsma v. Mercury Marine*, 537 U.S. 51, 62-63 (2002) (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) (emphasis added)); *see also Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 224 (1992) (a court's task "is simply to ascertain the fair meaning" of terms employed by Congress).

It is therefore dispositive that Congress has emphatically and expressly preempted "any" state disclosure requirements, such as California's, that exceed the information disclosures called for under federal testing and labeling programs. *See* 42 U.S.C. § 6293 (testing); *id.* § 6294 (labeling). State laws mandating the disclosure of energy efficiency information are preempted under the EPCA if they require "testing" or mere "use" in "any manner other than" what is required under federal law, or if they require "disclosure of information" "other than" the information that must be disclosed under federal law. *See id.* § 6297(a)(1). As petitioners explain, it is undisputed that California's regulations require manufacturers to disclose information not required under the federal regime. *See* Pet. 12.

Apart from unpersuasive nods toward statutory interpretation, the Ninth Circuit did not attempt to discern the plain meaning of the EPCA's express preemption provisions. It instead accepted California's invitation to apply an unprecedented presumption against preemption; construed the EPCA's preemption provisions "narrowly" (as it emphasized more than a dozen times); and read artificial limitations into the statute's otherwise unconditional terms. *See* Pet. App. at 4a, 7a, 8a & n.5, 12a, 14a. Specifically, the court below saved California's disclosure requirements by narrowly construing section 6297(a)(1)'s reference to "disclosure of information" as referring only to "consumer-directed labeling at point of sale or use." Pet. App. 12a. But no such qualifier appears in section 6297(a)(1). Nor does the panel's interpretation make sense. Congress expressly

sought to preempt differing disclosure requirements with respect to state testing or other state "uses" in section 6297(a)(1), actions that are disclosures to state regulators and not disclosures to consumers at the point of sale. Section 6297(a)(1) thus preempts state-mandated disclosures—to state regulators, to consumers, or to anyone else—that are not required under either the federal testing program, *see* 42 U.S.C. § 6297(a)(1)(A), or the federal labeling program, *see id.* § 6297(a)(1)(B).

The Ninth Circuit's anti-textual invocation of the presumption against preemption runs contrary to this Court's precedents. The presumption is a judicial tool for avoiding "*unintended* encroachment on the authority of the States." *CSX Transp.*, 507 U.S. at 664 (emphasis added). It does not apply where, as here, Congress's intent to preempt is manifest. *See United States v. Locke*, 529 U.S. 89, 107-08 (2000). As petitioners emphasize, the presumption may not be employed to "read [limitations] into the unconditional words of [a] statute." *EMA*, 541 U.S. at 256; *see also* Pet. 11-14. No matter how much a particular matter may fall within traditional state regulatory purview, when Congress properly exercises its enumerated powers the States are duty bound to respect those federally ordained enactments. *See* U.S. Const. art. VI cl. 2; *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108 (1992) ("under the Supremacy Clause, from which our pre-emption doctrine is derived, any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield") (internal quotations omitted). "The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that federal law must prevail." *Free v. Bland*, 369 U.S. 663, 666 (1962); *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 210-11 (1824).

To be sure, this Court's members have disagreed at times over the weight (if any) to be afforded the presumption when

Congress regulates in areas traditionally governed by the States. *See, e.g., Bates v. Dow Agrosciences LLC*, 125 S. Ct. 1788, 1805 (2005) (Thomas, J., concurring in the judgment in part and dissenting in part); *Cippolone v. Liggett Group, Inc.*, 505 U.S. 505, 544 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part). But the Court has never held that the presumption should apply where, as here, Congress regulates in areas that the States have *not* traditionally occupied. *See, e.g., Buckman Co. v. Plaintiffs Legal Committee*, 531 U.S. 341, 347-48 (2001) (because "[p]olicing fraud against federal agencies is hardly a field which the States have traditionally occupied," there is no "warrant [for applying] a presumption against finding federal pre-emption of a state-law cause of action") (internal quotation omitted). The structural interest in preserving States' regulatory powers is not implicated when the state regulatory activity falls outside a field traditionally occupied by state authority.

Oddly, the Ninth Circuit majority never paused to consider the history of state regulation in the area of appliance efficiency disclosures. Instead, the panel boldly presumed that Congress could not have meant what it said, because it discerned "no history of [a] significant federal presence." Pet. App. 4a.

Had the Ninth Circuit undertaken the proper analysis, it would have recognized that Congress adopted the EPCA in 1975 precisely because there had been no significant regulation of energy efficiency, leaving the United States vulnerable to the then-recent Arab oil embargo. *See Natural Res. Def. Council, Inc. v. Harrington*, 768 F.2d 1355, 1364 (D.C. Cir. 1985). It also would have been forced to confront the fact that California's efficiency program, which began two years *after* Congress passed the EPCA, cannot possibly establish that the States in general have "traditionally" been involved in the regulation of energy efficiency information. *Cf.* Pet. App. 22a (Noonan, J., dissenting) ("California is not

big enough alone single-handedly to generate" the presumption). In short, there is no history of state regulation that could justify applying a presumption against preemption.

B. There Is Confusion Among The Courts Of Appeals Over When The Presumption Against Preemption Should Apply.

The direct conflict between the Ninth Circuit's decision and this Court's prior decisions is emblematic of the differing preemption approaches confusingly embraced by the courts of appeals. Widespread uncertainty reigns over what conditions trigger the presumption—namely, whether the presumption applies only when the federal government seeks to supplant state law in areas of local concern historically regulated by the States (as some courts have concluded); or whether it applies in every preemption case (as other courts have suggested); or whether it applies whenever there is an absence of longstanding federal regulation (as the Ninth Circuit has held). This case presents an ideal opportunity to bring clarity to this important area of federal law.

Several courts have recognized that the presumption applies only when the federal government asserts its authority over traditional state prerogatives. *See* Pet. 16 (noting that the First, Second, Eighth, Eleventh, and D.C. Circuits have taken this approach). These courts have held that the presumption is not triggered in fields of regulation substantially occupied by federal authority. *See, e.g.*, *Flagg v. Yonkers Sav. & Loan Ass'n*, 396 F.3d 178, 183 (2d Cir. 2005); *United Parcel Service, Inc. v. Flores-Galarza*, 318 F.3d 323, 336 (1st Cir. 2003). They also have recognized that when Congress legislates in an area of national concern with no history of state regulation, no room remains for presumptions against the supremacy of federal law. *See, e.g.*, *Forest Park II v. Hadley*, 336 F.3d 724, 731 (8th Cir. 2003) ("unlike cases involving a field traditionally regulated by the states, there is no presumption against preemption in this case"); *BankWest, Inc. v. Baker*, 411 F.3d 1289, 1303 (11th

Cir. 2005) (noting that the presumption against preemption only applies "[i]n such situations" where Congress regulates in areas traditionally occupied by the States). The presumption "*only* arises ... if Congress legislates in a field traditionally occupied by the States." *United Parcel Service*, 318 F.3d at 336 (emphasis added).

In contrast, other courts have suggested that the presumption categorically applies in *all* preemption cases. *See* Pet. 16 (noting that the Fourth, Seventh, and Ninth Circuits have taken this approach). These courts have held that preemption analysis should "*always* start[] with the presumption that Congress did not intend to supplant state law." *Saul v. United States*, 928 F.2d 829, 840 (9th Cir. 1991) (internal quotation omitted); *Frank Bros., Inc. v. Wisconsin Dep't of Transp.*, 409 F.3d 880, 885 (7th Cir. 2005) ("we presume that, *in all circumstances*, Congress does not intend to supplant state law") (emphasis added). Significantly, however, even these pro-presumption courts have not gone as far as the court below. The Seventh Circuit has noted, for instance, that the presumption is readily "overcome" when there is a "clear declaration of intent to preempt state law." *Lynbrook Farms v. Smithkline Beecham Corp.*, 79 F.3d 620, 627 (7th Cir. 1996). Likewise, the Fourth Circuit has recognized that, although courts begin with a presumption that "'Congress does not intend to supplant state law,'" when "Congress expresses its intention clearly to do so through its constitutionally appointed legislative power, the Supremacy Clause establishes that federal law supersedes state law that either directly, by implication, or by express provision conflicts with federal law." *Metropolitan Ins. Co. v. Pettit*, 164 F.3d 857, 861 (4th Cir. 1998) (citation omitted).

Finally, in certain cases, as in this one, the Ninth Circuit has tacked in a radically different direction, holding that "a presumption against federal preemption" always applies "unless the state attempts to regulate an area in which there is

a history of significant federal regulation." *Gadda v. Ashcroft*, 377 F.3d 934, 944 (9th Cir. 2004); *see also Public Util. Dist. No. 1 of Grays Harbor Cty. Wash. v. IDACORP, Inc.*, 379 F.3d 641, 647 n.7 (9th Cir. 2004). The Ninth Circuit has thus transformed the background assumption that Congress proceeds cautiously when legislating in areas traditionally governed by the States into a general presumption in any area where the federal government has previously not been involved.

Further examples could be adduced, but the fundamental point is clear: Confusion abounds among the courts of appeals over the proper approach to applying the presumption against preemption. Because this confusion reflects lingering uncertainties in this Court's preemption jurisprudence, *certiorari* is warranted.

C. The Question Presented Is A Recurring One Of Exceptional Public Importance.

Certiorari is also warranted because the question presented is one of significant practical importance. If left uncorrected, the Ninth Circuit's unprecedented application of the presumption—requiring narrow constructions of express preemption provisions whenever there is an absence of prior federal regulation—opens the door for States to encroach on federal prerogatives and interfere with Congress's efforts to protect American businesses and consumers through uniform national regulation.

As petitioners explain, the Ninth Circuit's failure to strike down California's regulatory scheme will inevitably undermine Congress's national energy policy and undo the careful tradeoff Congress made between increased federal regulation and burdensome requirements imposed by each of the 50 States. *See* Pet. 21-24. Although Congress imposed stringent federal requirements, it expressly preempted state law in order "to protect the appliance industry from having to comply with a patchwork of numerous conflicting State

requirements," H.R. Rep. No. 100-11, at 24, and to "bring a degree of regulatory ... certainty to the business planning of the appliance industry," *id.* at 28. California's regulations fatally undermine that purpose. If the Ninth Circuit's decision is not reversed, the nation's energy efficiency policy for appliances will be seriously undermined. *See* Pet. 23-24. California will have free rein to interfere with federal regulatory goals, and its regulations will dramatically increase the burdens on businesses and the costs to consumers.

In addition, the Ninth Circuit's decision will have broader pernicious effects:

First, the Ninth Circuit's approach threatens to turn every express preemption case into an implied preemption case. The rule below invites courts to engage in largely standardless inquiries skewed by "presumptions" that run contrary to Congress's expressed intent. *See* Pet. App. 12a ("the legislative history [contains] no indication that Congress ... intended to preempt state regulations requiring the submission of data to state government agencies"). Under the Ninth Circuit's vision, a court's task will no longer be "an easy one" when "Congress makes its intent [to preempt] known through explicit statutory language." *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990). Instead, express preemption clauses may well become superfluous. *See, e.g.*, Michael K. Carrier, *Federal Preemption of Common Law Tort Awards By The Federal Food, Drug, and Cosmetic Act*, 51 FOOD & DRUG L.J. 509, 546 (1996) (explaining that express preemption must be "different from implied preemption, otherwise a preemption clause would be superfluous").

Second, by applying a presumption against preemption whenever Congress seeks to implement a uniform national policy for the first time, the Ninth Circuit makes it problematic for Congress to respond effectively to emerging regulatory challenges. If courts strain to "narrowly

interpret"—or, as here, actually rewrite—the terms of express preemption provisions, then any federal response to emerging events will be uncertain, delayed by litigation, and subject to encroachment by the States.

Numerous emerging regulatory areas of national concern exist where Congress may ultimately decide to proscribe state regulatory activity. For instance, Congress is considering legislation that would preempt state and local government interference with interstate commerce on the Internet or interactive computer services. *See* S. 442, 105th Cong. (1998); H.R. 1684, 109th Cong. (2005). Similarly, Congress has recently considered human cloning legislation that would preempt any state or local law establishing "prohibitions, requirements, or authorizations regarding human somatic cell nuclear transfer technology that are different than, or in addition to, those" established under federal law. H.R. 2172, 107th Cong. (2001). Neither bill has yet been enacted. Nonetheless, if Congress were to pass such legislation, the fact that "there is no history of significant federal presence" in these emerging areas of national concern should not give rise to a presumption against preemption. As this Court has recognized in other contexts, absurd results would flow if federal regulations of "recent vintage" were given less weight simply because they are applied in new or emerging industries. *Cf. Donovan v. Dewey*, 452 U.S. 594, 606 (1981) (recognizing that the duration of a federal scheme cannot be the only test for determining whether federal regulation is pervasive).

Third, and perhaps most troubling, the Ninth Circuit's anti-textual approach opens the door for States to employ strategic regulation to undermine existing federal schemes. It bears emphasis that it is virtually impossible for Congress to draft precise preemption provisions that anticipate what activity the 50 States might take to interfere with federal policies. Because no law can anticipate all contingencies, it will always be possible for States, like California, to invoke

distinctions that Congress could not possibly foresee and then use those distinctions to nullify express preemption provisions no matter how broadly they are framed. *See* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 290-91 (2000) (noting that "the presumption has taken on a life of its own, and is now being applied even to federal statutory provisions that plainly do manifest an 'inten[t] to supplant state law'"); Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2092 (2000) (noting that misuse of presumptions allows courts to "rewrite the laws enacted by Congress [and] disrupt the constitutional division of power between federal and state governments").

Indeed, in almost any context where Congress has expressly preempted state law, it is possible to conjure up "laudable" sub-classes of activity carved from the scope of an express preemption provision. In *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001), for instance, Massachusetts argued that state regulations governing outdoor and point-of-sale advertising for cigarettes were not preempted by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1334(b), because they governed the location, not the content, of advertising. *See id.* at 549. This Bay State creativity met with disfavor in this Court, which noted that the content/language distinction could not be reconciled with the statute's broadly worded preemption provision. Indeed, such an approach would allow the States to undermine the federal regulatory scheme. *See id*; *see also EMA*, 541 U.S. at 252 (rejecting California's attempt to advance the laudable goal of improving air quality by asserting that federal preemption of state and local emission standards covered only those standards relating to the sale, not the purchase, of new motor vehicles); *Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344, 355 (2000) (refusing to read the Federal Railroad Safety Act's express preemption provision narrowly in order to save state tort actions); *cf. Walker v. Armco Steel Corp.*, 446 U.S. 740, 750 n.9 (1980) (rejecting the suggestion that "the

Federal Rules of Civil Procedure are to be narrowly construed in order to avoid a 'direct collision' with state law"). Under the Ninth Circuit's logic, however, this Court should have employed a presumption against preemption, narrowly interpreted the federal statute in favor of state law, and turned a blind eye to Congress's expressed intent to preempt.

Amici and their members are concerned that the Ninth Circuit's novel approach to preemption will allow States to circumvent the plain language of express preemption provisions. In a wide variety of contexts, Congress has implemented uniform regulations and expressly preempted state law, recognizing that experimentation among the States is not always in the best interest of American businesses and consumers. In particular, Congress has sought in certain areas of national concern to avoid the wasteful inefficiencies and costs to consumers that would otherwise result if businesses that sell goods and services in interstate commerce were required to comply with a "patchwork" of 50 differing state regulations. *See, e.g.* 29 U.S.C. § 1144(a) (expressly preempting state laws relating to employee benefit plans); 42 U.S.C. § 5403(d) (expressly preempting state "manufactured home construction and safety standard[s]"); 47 U.S.C. § 332(c)(3)(A) (expressly preempting state laws attempting "to regulate the entry of or the rates charged by any commercial mobile service"); 49 U.S.C. § 20106 (expressly preempting state laws relating to areas of railroad security already regulated by either the Secretary of Transportation or the Secretary of Homeland Security); 49 U.S.C. § 30103(b) (expressly preempting state motor vehicle safety standards that are different than federal standards); 49 U.S.C. § 41713(b)(4)(A) (expressly preempting state laws relating "to a price, route, or service" of air carriers). In such contexts, uniform federal regulation has formed a solid foundation for the product and regulatory compliance planning of *amici* and their members. *Amici* and their

members, as well as American consumers in general, would suffer substantial harm—potentially to the tune of hundreds of millions, if not billions, of dollars—if States could effectively nullify express preemption provisions by invoking clever distinctions and urging courts to rewrite plain statutory text in service of a presumption against preemption.

Finally, the Ninth Circuit's approach necessarily risks allowing States to undo the "somewhat delicate balance between statutory objectives" struck by the federal government. *Buckman*, 531 U.S. at 348. The Ninth Circuit's approach, which invites courts to disregard the natural meaning of express preemption provisions whenever state regulations serve "laudable" goals, Pet. App. 2a, creates precisely the uncertainty, costs, and even risks to safety that Congress sought to avoid when it called for uniform, federal regulation. As this Court has recognized, "[d]eciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 528 (1987) (emphasis omitted). Where, as here, Congress paints over state and local laws with a broad preemptive brush, such provisions should be interpreted to protect and implement federal statutory regimes from encroachment by the States.

CONCLUSION

For the foregoing reasons, and for reasons set forth in the petition, the Court should grant the writ of *certiorari*.

Respectfully submitted,

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